United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-3077

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Docket No. 76-3077

UNITED STATES OF AMERICA,

PETITIONER,

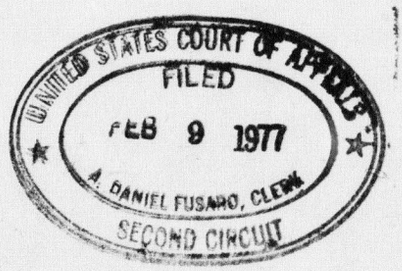
-vs-

HONORABLE JON O. NEWMAN
UNITED STATES DISTRICT JUDGE

NOMINAL RESPONDENT

(MARGARET LEE ROBINSON AND PATRICIA SAVARESE,
DEFENDANTS BELOW AND ACTUAL RESPONDENTS)

SUGGESTION FOR REHEARING EN BANC



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The respondents, Margaret Lee Robinson and Patricia Savarese, suggest pursuant to Fed. R. App. P. 35(b) that the Court rehear en banc the government's petition for a writ of mandamus. The panel (Anderson, Smith and Timbers, JJ.) granted the writ, ordering Judge Newman to vacate certain pretrial orders in a criminal case. Slip Op. 1559 (Jan. 25, 1977). The district court, in an opinion reported at 421 F. Supp. 467 (D. Conn. 1976), directed that the names of four Black veniremen peremptorily stricken by the prosecutor be restored to the jury panel available for final selection.

Before this Court granted its stay, a jury including two of these Black veniremen was selected and sworn. Judge Newman also directed that the United States Attorney for Connecticut keep records on the use of peremptory challenges by his assistants and make them available for public inspection. These orders were based on the conclusion, reached after careful analysis of unchallenged statistics covering all federal criminal trials held in Connecticut over a two-year period, "that the pattern of government peremptory challenges of Black veniremen has now reached an excessive point that calls for the exercise of this Court's supervisory power over the conduct of criminal trials in this District." 421 F. Supp. at 473.

The Court should rehear this case en banc because it involves a question of exceptional importance and because the panel decision cannot be reconciled with the uniform precedents of this Court strictly limiting the circumstances under which mandamus will be granted at the behest of the prosecutor in a criminal case.

I. The Panel's Exclusive Reliance on Inapposite Supreme Court Precedent for its Apparent Holding that a District Court Lacks Any Supervisory Power Over the Abuse of Peremptory Challenges Calls for En Banc Correction.

An essential predicate to the exercise of this Court's mandamus power under 28 U.S.C. §1651(a) is a "usurpation of power" by the district court. Will, J. v. United States, 389 U.S. 90, 95 (1967). Judge Newman relied in this case on his "supervisory power over the conduct of criminal trials," 421 F. Supp. at 473. This power has been recognized in precisely the present context in United States v. Nelson, 529 F.2d 40, 43 (8th Cir.), cert. denied, 96 S.Ct. 2631 (1976), and United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971). It is clearly implied in United States v. Grant, 494 F.2d 120, 123 (2d Cir. 1974)(voir dire), and 28 U.S.C. §1866(c) (peremptories may not be exercised so as to exclude a class of persons from jury service). Without discussing any of these authorities, the panel suggests that the district court was entirely without power to remedy the abuse of peremptories. Slip Op. at 1571, 1580. This unjustified and unprecedented deprecation of the district court's well settled powers, especially by way of mandamus, requires reexamination and correction by the Court en banc.

In place of the relevant federal supervisory standards, the panel opinion relies exclusively on Swain v. Alabama, 380 U.S. 202 (1965). In Swain, a Black man convicted in

a state court sought reversal on the ground that the prosecutor's peremptory challenge of all available Black jurors had denied him a right guaranteed to state defendants by the federal Constitution. He offered to prove that no Black had sat as a juror in that county for many years, but he could not show to what extent this phenomenon was directly attributable to the prosecutor's use of peremptory challenges. The Supreme Court denied relief by a narrow majority. A federal district court, in the exercise of its supervisory power, is not limited to enforcement of only Constitutional minimum standards, as is the Supreme Court in considering reversal of a state conviction. This fundamental distinction, entirely overlooked by the panel in this case, shows why Judge Newman's decision was at worst a merely erroneous exercise of his proper powers. Accordingly, the mandamus should not have been granted. United States v. Griesa, J., 481 F.2d 276 (2d Cir. 1973); United States v. DiStefano, 464 F.2d 845, 849-51 (2d Cir. 1972); United States v. Chashin, J., 281 F.2d 669 (2d Cir. 1960); United States v. Lawrence, J., 3 Dall. (3 U.S.) 42, 53-54 (1795)(per curiam).

II. The Panel Applied an Excessively Lenient Standard for the Granting of Mandamus at the Behest of a Prosecutor, When it Vacated an Order Which Neither Aborted the Prosecution nor Violated Any Rule.

In a long and unbroken line of cases, this Court has enforced a strict standard in ruling on the availability of mandamus relief to federal prosecutors. Only when the district judge erroneously aborted a prosecution, or effectively threatened to do so by taking action inconsistent with the rules of procedure, has this Court granted the extraordinary writ.* The reasons for this strict limitation were explicated by a unanimous Supreme Court in Will, J. v. United States, 389 U.S. 90 (1967). Any lowering of this standard tends to undermine defendants' double jeopardy and speedy trial rights, id. at 96, and to deprecate the Congressional judgment underlying 18 U.S.C. §3731. United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972), quoting Will, supra, 389 U.S. at 97 n.5. As a result, mandamus will lie only to prevent a "gross disruption in the administration of criminal justice," United States v. Dooling, J., 406 F.2d 192, 198 (2d Cir.), cert. denied, 395 U.S. 411 (1969), "amounting to a judicial 'usurpation of power.'" Will, supra, 389 U.S. at 95. Neither branch of this test was satisfied here.

The panel decision fails to identify any respect in which Judge Newman's modest order would grossly disrupt the administration of criminal justice. The panel stated:

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* See page 7 for list of cases.

> [T]he district court's opinion cannot but have an immediate and continuing detrimental impact on the administration of criminal justice in the District of Connecticut.... Among other things it is likely to bring about interminable delays in criminal trials as the result of constant defense challenges to arrays and final panels every time a Black is peremptorily challenged by the United States Attorney's office or in case no Black happens to be drawn on an array or final panel.

Slip Op. at 1582. This statement finds no support in Judge Newman's actual ruling. First, the opinion had nothing whatever to do with challenges to the array or to cases in which "no Black happens to be drawn on an array or final panel." Only intentional exclusion of Black jurors by means of peremptories was involved. Second, the very purpose of the record-keeping requirement was to prevent any undue delay. Complete statistics for the 1974-1976 period have already been compiled in connection with this case, and the maintenance of records in the future would make such challenges readily raisable in appropriate cases. Moreover, Judge Newman's opinion suggests that if the excessive rate of racial exclusion continued, the appropriate relief might not be interlocutory. 421 F. Supp. at 474-75. In any case, no delay in trial would result.

Even the government no longer contends that juries with more Blacks would be less likely to convict, and no other "detrimental impact on the administration of criminal justice"

has been suggested, much less any "gross disruption," which has heretofore been thought to be the standard. By substituting a "detrimental impact" test in lieu of the traditional and proper "gross disruption" standard, and then applying that lower standard in an unrigorous fashion, the panel opinion defies the relevant precedents of this and the Supreme Court. Such an unwarranted and dangerous departure merits en banc review and correction.

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United States v. Werker, J.,
535 F.2d 198 (2d Cir.), cert. denied, 45 U.S.L.W. 3330 (1976)

III. The Panel's Misapprehension of the Right Which Judge Newman Upheld--That of Black Citizens to Equal Participation in the Jury Process--and the Improper Rejection of his Findings of Fact Led to an Incorrect Decision on an Issue of Exceptional Importance.

The panel's view of the case was based in part on an erroneous impression of the right at stake. Judge Newman rejected the defendants' (now respondents') claim of a fair trial violation on their own behalf, resting his ruling instead on a thoughtful discussion of their standing to raise the rights of potential Black jurors. 421 F. Supp. at 470-71 and n.4. Respondents did not reassert any claim on their own behalf in this Court, and instead relied on Judge Newman's analysis. Yet the panel opinion makes no mention of the right that was actually upheld in the challenged decision, instead reciting erroneously that: "This motion is concerned with the rights of these defendants in having a fair and impartial jury and one which represents a fair cross-section of the community." Slip Op. at 1567; see also id. at 1565, 1579.

This misconception of the legal basis of the claim Judge Newman upheld underlies the panel's strongly worded finding "that the evidence submitted is inadequate in kind and quality and particularly in its relevancy and accuracy to support the conclusions reached . . . ." Id. at 1565. Moreover, the panel's rejection of Judge Newman's carefully documented

findings of fact violates the rule of In re Cooper, 143 U.S. 472, 509-13 (1892). In Cooper, the Supreme Court held that in an extraordinary proceeding instituted in an appellate court, the findings of fact below control. Compare slip op. at 1577, where the panel, as if it were dealing with a routine civil appeal, said:

> As the evidence in this case is presented entirely on court or other official records and on affidavits, the reviewing court is in as good a position as was the trial court to pass upon matters of weight and credibility.

By reinterpreting the evidence in the light of a different legal claim than that upheld in the district court, the panel opinion derogates the importance of the true underlying issue in this case: the proven, intentional exclusion of Black veniremen from jury service by the excessive use of government peremptory challenges against them. Because the issue is of such obvious importance to both the reality and the appearance of justice in the federal courts, and because of the nature of the panel's treatment of both the law and the facts, this Court should reconsider the matter en banc.